IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01-02-2006

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MRS. JUSTICE CHITRA VENKATARAMAN

O.S.A.NO.322 of 2003
and
C.M.P.NO.14565 of 2003

1. R. Rajagopal @ R.R. Gopal
   @ Nakkheeran Gopal,
   Editor, Printer & Publisher of
   Nakkheeran (Bi-weekly),
   Nakkheeran Publications,
   Nakkheeran Printers and Binders
   105, Jani Jahan Khan Road,
   Royapettah, Chennai 600 014.

2. A. Kamaraj
   Associate Editor,
   Nakkheeran (Bi-weekly),
   Nakkheeran Publications,
   Nakkheeran Printers and Binders
   105, Jani Jahan Khan Road,
   Royapettah, Chennai 600 014. .. Appellants

Vs.

1. J. Jayalalitha
   D/o. late R. Jayaram
   New No.81, Old No.36,
   Poes Garden, Chennai 86.

2. Mrs.N. Sassikala
   W/o.M. Natarajan
   New No.81, Old No.36,
   Poes Garden, Chennai 86. .. Respondents

Appeal filed under Order 36 Rule 11 of O.S. Rules read with Clause 15 of Letters Patent against the ad-interim ex-parte order dated 10.7.2003 passed by the learned single Judge in O,.A.No.599 of 2003 in C.S.No.477 of 2003, on the file of Original Side of this Court.

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For Appellants : Mr.P.T. Perumal

For Respondents : Mr.N. Jothi

J U D G M E N T

The present appeal under Clause 15 of the Letters Patent is purported to be filed against the order dated 10.7.2003 passed by the learned single Judge in O.A.No.599 of 2003 arising out of C.S.No.477 of 2003. Such C.S.No.477 of 2003 was filed by the present respondents for damages on the ground that the present appellants have published defamatory articles.

2. O.A.No.599 of 2003 was filed seeking for an order of injunction restraining the defendants (present appellants) from publishing in future publications, articles, caricatures, news items, cartoons, etc., defamatory or derogatory in nature in the Tamil Bi-weekly Nakkheeran or in any special editions thereof or any publication of the defendants without prior verification with the plaintiffs.

3. Such application was taken up on 10.7.2003 and the learned single Judge passed an ex parte order of injunction. The relevant portion of the order is to the following effect :-

> " 5. The blanket injunction that is sought for by the applicants cannot be granted. However, injunction is granted in favour of the 1st applicant subject to the following conditions:-
>
> 1. The respondents are not restrained from publishing materials that other newspapers have also published or have already published regarding the 1st applicant.
>
> 2. The respondents have a right to comment on the 1st applicant as a political and public figure which will include policy decisions etc., and this right cannot be curtailed.
>
> 3. With regard to publication regarding the personal life of the 1st applicant, the respondents shall make such applications after verifying with the 1st applicant.
>
> 6. Injunction as above is granted and is restricted to two weeks. Notice. Private notice is permitted. Compliance with Order 39 Rule 3."

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4. Even though the appeal is purported to be against the said order, in the Memorandum of appeal, it has been indicated that after the aforesaid ex parte order was passed, the present appellants filed counter affidavit in O.A.No.599 of 2003 on 21.7.2003 praying for setting aside the order and they also filed a vacate stay petition numbered as Application No.3095 of 2003. Such matter appeared on 25.7.2003. According to the appellants, the matter was being repeatedly adjourned at the instance of the plaintiffs/respondents as they wanted to file counter affidavit to the petition for vacating the interim order, whereas according to the counsel for the present respondents 1 and 2 the matter was being adjourned not at the instance of the plaintiffs, but at times at the instance of the present appellants. For the purpose of deciding the appeal, it is not necessary to go into this question. It is also impossible to decide this because the order sheet does not reveal why the matter was being adjourned. Be that as it may, ultimately, the matter was posted to 14.8.2003. Admittedly on that day the learned counsel appearing for the present respondents contacted Mr.P.T. Perumal, learned counsel appearing for the present appellants, indicating that he intended to move the matter before the learned single Judge after lunch, as the matter had not been listed and as the interim order was to expire. It is also not disputed that Mr.P.T. Perumal was in Delhi and he expressed his inability to send his junior immediately and indicated that the matter may be listed on some later date. However, on the request of the learned counsel for the plaintiffs, the matter was taken up at 2.15 p.m. by a learned single Judge of this Court, who extended the interim order and posted the matter to 26.9.2003.

5. The main grievance of the appellants is that the above situation of extending the ad interim ex parte order by about 45 days is violative of Order 39 Rule 3A of CPC. Even though the appeal has been filed after the aforesaid order dated 14.8.2003, formally, the appellants have challenged the initial ex parte interim order dated 10.7.2003.

6. The main contention of the learned counsel for the appellants is to the effect that as per the requirement of Order 39 Rule 3A, an order of injunction is required to be finalised within 30 days and, therefore, illegality has been committed by not disposing of the matter within the stipulated period. Learned counsel for the appellants has also submitted that there was no justification to pass an ex parte order of injunction and therefore the order dated 10.7.2003 was illegal and improper.

7. Learned counsel appearing for the plaintiffs / respondents on the other hand has raised a preliminary objection regarding maintainability of the appeal against an interlocutory order and submitted that the appeal against the order dated 10.7.2003 is not maintainable. He has further submitted that even

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on and after 26.9.2003, the matter relating to injunction has been listed and the learned counsel for the present appellants instead of proceeding with the matter relating to interim injunction, has sought for adjournment on the ground that present appeal has been filed. He has further submitted that there was sufficient justification for the learned single Judge to pass the ex parte ad interim order.

8. We have heard the learned counsels for both the parties on the question of maintainability as well as on merit. The question of maintainability of the appeal is of course required to be considered first.

9. The main objection raised by the learned counsel for the plaintiffs / respondents is to the effect that the appeal, which is against an ex parte interim order of injunction dated 10.7.2003, is not maintainable under Clause 15 of the Letters Patent, as it cannot be said that such order is a "judgment" within the meaning of Clause 15 of the Letters Patent. In support of the aforesaid conclusion, he has placed reliance upon several decisions of the Supreme Court, this Court as well as other High Courts. It is not necessary to refer to all those decisions, save and except a few including one of the Supreme Court reported in (1981) 4 SCC 8 (SHAH BABULAL KHIMJI v. JAYABEN D. KANIA AND ANOTHER). In such case, after referring to several earlier decisions, it was observed :-

> " 78. Thus, after considering the arguments of counsel for the parties on the first two limbs of the questions, our conclusions are :
>
> (1) That there is no inconsistency between Section 104 read with Order 43 Rule 1 and the appeals under the Letters Patent and there is nothing to show that the Letters Patent in any way excludes or overrides the application of Section 104 read with Order 43 Rule 1 or to show that these provisions would not apply to internal appeals within the High Court.
>
> (2) That even if it be assumed that Order 43 Rule 1 does not apply to Letters Patent appeals, the principles governing these provisions would apply by process of analogy.
>
> (3) That having regard to the nature of the orders contemplated in the various clauses of Order 43 Rule 1, there can be no doubt that these orders purport to decide valuable rights of the parties in ancillary proceedings even though the suit is kept alive and that these orders do possess the attributes or character of finality so as to be judgments within the meaning of Clause 15 of the Letters Patent and hence, appealable to a larger Bench.
>
> (4) The concept of the Letters Patent governing only the internal appeals in the High Courts and the Code of

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Civil Procedure having no application to such appeals is based on a serious misconception of the legal position."

10. While considering the meaning to be ascribed to the expression "judgment", the Supreme Court, extracted the following opinion of the Chief Justice White in ILR 35 Madras 1 (T.V.TULJARAM ROW v. M.K.R.V. ALAGAPPA CHETTIAR) :-

" The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent."

11. The Supreme Court proceeded to observe :

"91. Analysing the observations of the learned Chief Justice it would appear that he has laid down the following tests in order to assess the import and definition of the word 'judgment' as used in Clause 15 of the Letters Patent:

(1) It is not the form of adjudication which is to be seen but its actual effect on the suit or proceeding;

(2) If, irrespective of the form of the suit or proceeding, the order impugned puts an end to the suit or proceeding it doubtless amounts to a judgment;

(3) Similarly, the effect of the order, if not complied with, is to terminate the proceedings, the said order would amount to a judgment;

(4) Any order in an independent proceeding which is ancillary to the suit (not being a step towards judgment) but is designed to render the judgment effective can also be termed as judgment within the meaning of the Letters Patent.

So far as this test is concerned, the learned Chief Justice had in mind orders passed by the Trial Judge granting or refusing ad interim injunction or appointing or refusing to appoint a receiver.

(5) An order may be a judgment even if it does not affect the merits of the suit or proceedings or does not

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determine any rights in question raised in the suit or proceedings.

(6) An adjudication based on a refusal to exercise discretion the effect of which is to dispose of the suit, so far as that particular adjudication is concerned, would certainly amount to a judgment within the meaning of the Letters Patent.

. . .

93. So far as the tests laid down by White, C.J., and as analysed by us, are concerned we are inclined to agree generally with these tests though we feel that some of the tests laid down are far too wide and may not be quite correct. While the view taken by Sir Richard Couch, C.J. in The Justices of the Peace for Calcutta is much too strict, the one taken by Sir White, C.J. is much too wide. The correct test seems to lie somewhere in between the tests laid down by the aforesaid jurists."

12. Thereafter, after referring to several decisions of other High Courts and the Supreme Court, it was observed:-

"115. Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the Trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment.

...

118. The various instances given by us would constitute sufficient guidelines to determine whether or not an order passed by the Trial Judge is a judgment within the meaning of the Letters Patent. We must however hasten to add that instances given by us are illustrative and not exhaustive. We have already referred to the various tests laid down by the Calcutta, Rangoon and Madras High Courts. So far as the Rangoon High Court is concerned we have already pointed out that the strict test that an order passed by the Trial Judge would be a judgment only if it amounts to a decree under the Code of Civil Procedure, is legally erroneous and opposed to the very tenor and spirit of the language of the Letters Patent. We, therefore, do not approve of the test laid down by the Rangoon High Court and that decision therefore has to be confined only to the facts of that particular case because that being a case of transfer, it is manifest that no question of any finality was involved in the order of transfer. We would like to adopt and approve of

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generally the tests laid down by Sir White, C.J. In Tuljaram Row case (which seems to have been followed by most of the High Courts) minus the broader and the wider attributes adumbrated by Sir White, C.J. Or more explicitly by Krishnaswamy Ayyar, J. as has been referred to above.

119. Apart from the tests laid down by Sir White, C.J., the following considerations must prevail with the court :

(1) That the Trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the Trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice to one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the Trial Judge. The courts must give sufficient allowance to the Trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is ex facie legally erroneous or causes grave and substantial injustice.

(2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.

(3) The tests laid down by Sir White, C.J. as also by Sir Couch, C.J. as modified by later decisions of the Calcutta High Court itself which have been dealt with by us elaborately should be borne in mind."

13. From the above discussion made by the Supreme Court, it appears to be very clear that an order which is appealable under Order 43 Rule 1 can be held to be appealabe under Clause 15 of the Letters Patent. Even assuming that Order 43 Rule 1 is not applicable, even apart from such orders, other interlocutory orders which decides matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the parties concerned, can be considered as judgment to be appealable under the Letters Patent. Since the Supreme Court has summarised several illustrations of such interlocutory orders, which may be treated as judgment within the meaning of the Letters Patent in paragraph 120, it is not necessary to repeat.

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14. Judged in the light of the above discussion, there cannot be any doubt that an ex parte ad interim order of injunction ipso facto is not appealable under the Letters Patent as it cannot be considered as a 'judgment' within the meaning of the Letters Patent inasmuch as the opinion expressed is tentative as well as temporary and the party affected has enough scope and opportunity to seek for revocation or modification of such order and in that sense such ex parte ad interim order is not considered as final and, therefore, not appealable.

15. It is not necessary to refer to numerous decisions on this aspect, save and except referring to the Division Bench decision of this Court reported in 1989(1) MLJ 147 (R. KANNAN AND OTHERS v. INDCHEM ELECTRONICS LIMITED), wherein the Division Bench consisting of Hon'ble Judges Ratnavel Pandian and Venkataswami, as His Lordships then were, held such ad interim order of injunction is not appealable.

16. The above conclusion, however, is not the end of the road for the appellants. Learned counsel appearing for the appellants, while not disputing the proposition of law indicated in the said decision and analysed above, has placed strong reliance upon the decision of the Supreme Court reported in 2000(IV) CTC 358 (A. VENKATASUBBIAH NAIDU v. S. CHALLAPPAN AND OTHERS) and has contended that even though ordinarily an ex parte order of ad-interim injunction may not be appealable either under the Letters Patent or under Order 43 Rule 3 CPC, if such matter is not decided within the time stipulated by the Legislature and there is a transgression of the principle contained in Order 39 Rule 3A, such order would become appealable.

17. In the aforesaid Supreme Court decision, the question of appealability of an ex parte order of injunction under Order 43 Rule 1 CPC was in issue. The trial Court in the said case had passed such ex parte order on 29.6.1999 and notice was issued returnable by 25.8.1999, i.e., for a period of two months. The aggrieved defendant filed Revision under Article 227 of the Constitution before the High Court of Madras. Learned singe Judge of Madras High Court observed that such order by the trial court was in clear violation of Order 39 Rule 3A and further concluded by referring to prima facie merit of the case that the ex parte order was unsustainable and such order was accordingly set aside and the learned single Judge further directed the trial court to take up the interlocutory application for injunction and pass orders on merit. Such order of the High Court was challenged in the Supreme Court. The Supreme Court while not discounting the possibility of challenging the ex parte order of injunction under Order 43 Rule 1 (see para 10), proceeded to analyse the scope of Order 39 Rule 3A and observed :-

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"15. The aforesaid Rule casts a three-pronged protection to the party against whom the ex parte injunction order was passed. First is the legal obligation that the Court shall make an endeavour to finally dispose of the application of injunction within the period of thirty days. Second is, the legal obligation that if for any valid reasons the Court could not finally dispose of the application within the aforesaid time the Court has to record the reasons thereof in writing.

16. What would happen if a Court does not do either of the courses? We have to bear in mind that in such a case the Court would have by-passed the three protective humps which the legislature has provided for the safety of the person against whom the order was passed without affording him an opportunity to have a say in the matter. First is that the Court is obliged to give him notice before passing the order. It is only by way of a very exceptional contingency that the Court is empowered to by-pass the said protective measure. Second is the statutory obligation cast on the Court to pass final orders on the application within the period of thirty days. Here also it is only in very exceptional cases that the Court can by-pass such a rule in which cases the legislature mandates on the Court to have adequate reasons for such bypassing and to record those reasons in writing. If that hump is also bypassed by the Court it is difficult to hold that the party affected by the order should necessarily be the sole sufferer.

17. It is the acknowledged position of law that no party can be forced to suffer for the inaction of the Court or its omissions to act according to the procedure established by law. Under the normal circumstances the aggrieved party can prefer an appeal only against an order passed under Rules 1, 2, 2A, 4 or 10 of Order 39 of the Code in terms of Order 43, Rule 1 of the Code. He cannot approach the appellate or revisional Court during the pendency of the application for grant or vacation of temporary injunction. In such circumstances the party who does not get injustice due to the inaction of the Court in following the mandate of law must have a remedy. So we are of the view that in a case where the mandate of Order 39 Rule 3A of the Code is flouted, the aggrieved party, shall be entitled to the right of appeal notwithstanding the pendency of the application for grant of vacation of a temporary injunction, against the order remaining in force. In such appeal, if preferred, the appellate Court shall be obliged to entertain the appeal and further to take note of the omission of the subordinate Court in

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complying with the provisions of Rule 3A. In appropriate cases the appellate Court, apart from granting or vacating or modifying the order of such injunction, may suggest suitable action against the erring judicial officer, including recommendation to take steps for making adverse entry in his ACRs. Failure to decide the application or vacate the ex parte temporary injunction shall, for the purposes of the appeal, be deemed to be the final order passed on the application for temporary injunction, on the date of expiry of thirty days mentioned in the Rule."

18. From the aforesaid decision it thus becomes clear that where the mandate of Order 39 Rule 3A is flouted, the aggrieved person is entitled to the right of appeal notwithstanding the pendency of the application for grant of vacation of a temporary injunction against the order remaining in force (emphasis added). In such appeal, the appellate Court shall be obliged to entertain the appeal and further to take note of the omission of the subordinate Court in complying with the provisions of Rule 3A.

19. Judged in the light of the aforesaid observation, the question has to be decided in the present appeal. So far as the initial ex parte order of injunction is concerned, there is no question of violation of any provision contained in Order 39 Rule 1 or Rule 3A CPC as the leaned single Judge had confined the extent of order to only 15 days and had directed compliance with Order 39 Rule 3 and had posted the matter for disposal. Even though thereafter the matter was adjourned, it is obvious that efforts were being made to take up the matter. Subsequently, however, the matter was not listed on the date fixed and the present respondents requested the matter to be taken up and at that stage notwithstanding the fact that the learned counsel for the appellants was not present, (and since the matter had not been listed one cannot blame the counsel for the appellants not being present or not being able to depute a junior, particularly when Mr. Perumal, learned counsel for the appellants, was away at Delhi), it would have been more appropriate for the learned single Judge to post the matter after a very short gap. Even though the discretion of the learned single Judge in extending the ex parte order of injunction cannot be found fault with, the posting of the matter to a date about 45 days beyond the date of such extension was inappropriate, more particularly keeping in view the provisions contained in Order 39 Rule 3A as well as the observations made by the Supreme Court.

20. In such a background, it can be observed that the appellants are obviously justified in filing an appeal. It is of course true that the appellants have filed the appeal specifically against the initial ex parte order of injunction, which technically may not be appealable, but the fact remains that the appellants have narrated the entire development and referred to the order passed by

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the learned single Judge and as to how the ex parte order of injunction was extended on the basis of special mention for a period of 45 days.

21. This does not however mean that such order of extension is ipso facto void merely because such extension may prima facie be contrary to the provisions contained in Order 39 Rule 3A. As observed by the Supreme Court such order would not be ipso facto void, but it gives rise to a cause of action to the aggrieved party to file appeal.

22. Keeping in view the above discussion, the next question is as to how the present appeal is to be disposed of. There is no dispute that in the present case the present appellants have already filed their objections and have also filed a petition for vacating the order of injunction. The matter relating to injunction under Order 39 Rule 1 & 2 is yet to be considered by the learned single Judge on merit as subsequently such matter is being adjourned because of the pendency of the present appeal. Even though there is no embargo for this Court to consider the question of injunction on merit, adopting such a course may not be appropriate as any observation made by a Division Bench on the merits of the injunction petition may have the tendency of prejudicing the ultimate trial. Moreover, since the matter is yet to be considered on merit by the learned single Judge, it would be more appropriate if the matter would be disposed by the learned single Judge rather than the Division Bench so that the normal avenue of appellate remedy would be available to the aggrieved party.

23. Having regard to all these aspects, we feel interest of justice would be served by observing that the matter relating to injunction and vacating the order of injunction should be considered by the learned single Judge as expeditiously as possible keeping in view the provisions contained in Order 39 Rule 3A as well as the sentiments expressed by the Supreme Court in the aforesaid decision. It goes without saying that the learned single Judge would deal with the matter in accordance with law without being influenced by any observation made in any of the earlier ex parte order of injunction or continuance of such ex parte order of injunction. To facilitate early disposal of the matter, we direct the Registry to list the matter before the appropriate Court on 8.2.2006. Once the matter is listed, it would be open to the learned single Judge to take up the matter for hearing on that date or any other convenient date.

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24. The appeal is accordingly disposed of subject to the aforesaid observations. No costs. Consequently, CMP.No.14565 of 2003 is closed.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

dpk

To

1. The Deputy Registrar
Original Side,
High Court, Madras.

2. The Sub Asst. Registrar,
Original Side
High Court, Madras.
(for posting the matter on 8.2.2006)

1 cc to Mr.P.T. Perumal, Advocate, SR. 4124

OSA.NO.322/03

TEJ (CO)
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